St. John's Law Review

Volume 41
Number 2 *Volume 41, October 1966, Number 2*

Article 18

April 2013

CPLR 311: Service Upon Public Corporation at Improper Address Validated

St. John's Law Review

return receipt), and publish a copy of the summons and court order in a specified paper in defendant's locale.

The appellate division validated this method of service and, for the reasons expressed in *Dobkin,* held that there was no constitutional impediment to this particular method of service.

These two cases illustrate the utility of CPLR 308(4) and indicate that this subsection can be of great assistance to plaintiffs when it is impossible to comply with the statutory methods of service. Although the potential of CPLR 308(4) is vast, it should be noted that, just as the particular methods of service upheld by the instant cases depended upon the particular circumstances found therein, devised methods of service must be tailored to the unique factors of each individual case. The court in devising such methods of service must always be wary of transgressing the basic requirements of the "due process" which must be afforded a defendant. In both of the instant cases, strong dissenting opinions were voiced which stated that each of the defendants had, in fact, been denied "due process" since the methods of service devised were not likely to afford them *actual notice.*[85]

CPLR 311: Service upon public corporation at improper address validated.

Ware v. Manhattan & Bronx Surface Transit Operating Authority[86] illustrates how some courts look with disfavor upon those activities of public agencies which make it difficult for plaintiffs to serve process. This case involved a motion to give effect to a notice of claim filed a day late upon the defendant. The plaintiff alleged that the notice was timely since, on the last day allowed for filing, her attorney attempted service by going to the only address listed for the defendant in the telephone directory.[87] When he arrived he was directed to an attorney for the Authority whose office was located in an adjoining building. There, upon making his intentions known to the guard in the lobby, he was told that the Authority's attorney had left, and that no one else would accept the notice. When he requested permission to go up to the office of the defendant's attorney, his request was refused, and he was advised to go to the defendant's claims department across town. By the time

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[85] Sellars v. Raye, 25 App. Div. 2d 757, 758-59, 269 N.Y.S.2d 7, 10-11 (2d Dep't 1966); Dobkin v. Chapman, *supra* note 83, at 747-49, 269 N.Y.S.2d at 52-54.

[86] 49 Misc. 2d 704, 268 N.Y.S.2d 519 (Sup. Ct. N.Y. County 1965).

[87] CPLR 311 provides rules for service upon corporations. Since the defendant was a public corporation for which service is not specifically provided by CPLR 311(2)-(7), CPLR 311(1) was held to apply. Accordingly, service upon an officer, director, managing or general agent would be sufficient.

he arrived there, the claims department was closed for the day. The notice was served the next day.

The court held that under these facts it would treat the notice of claim as timely filed "on the familiar principle that equity treats that as done which ought to have been done."[88] The court stated that it would not permit building employees to interfere with the normal service of process—"if papers are tendered at an office by an attorney, and he is prevented from effectuating such service, this court will treat such papers as duly served. . . ."[89]

The defendant claimed that the Authority had published a notice in the New York Law Journal that notices of claim were to be filed at the claims department. The court answered that "respondent should not be heard to assert that, hidden somewhere, perhaps on a musty library shelf, under a date which is not given, is a copy of an issue of the New York Law Journal which states . . . [where] papers should be served. . . ."[90]

Although the court does not expressly so state, a species of estoppel appears to be the basis of its holding, *i.e.*, the defendant acted in such a way so as to cause the plaintiff to act in reliance thereupon, to her detriment. The fact that the court cited two cases unrelated to service of process, but dealing with situations wherein a litigant was estopped from asserting a claim or defense[91] adds weight to this view.

The holding in the instant case receives some support from the decision of the Court of Appeals in *Teresta v. City of New York*.[92] In that case, the plaintiff had improperly filed a notice of claim. The defendant, despite the improper notice, summoned the plaintiff for an examination of the merits of his claim. Only later did the defendant raise an objection to the method of service. Under these facts the Court of Appeals found elements of estoppel and held that the requirement of proper filing had been waived. The Court stated that "neither legal theory nor public policy stands in the way of [such] a waiver. . . ."[93]

It seems, therefore, that the Court of Appeals favors the view that both waiver and estoppel may operate to preclude a public

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[88] Ware v. Manhattan & Bronx Surface Transit Operating Authority, 49 Misc. 2d 704, 706, 268 N.Y.S.2d 519, 522 (Sup. Ct. N.Y. County 1965).

[89] *Ibid.*

[90] *Ibid.*

[91] The court cited Triple Cities Constr. Co. v. Maryland Cas. Co., 4 N.Y.2d 443, 151 N.E.2d 856, 176 N.Y.S.2d 292 (1958), and Romano v. Metropolitan Life Ins. Co., 271 N.Y. 288, 292 N.E.2d 661 (1936), neither of which was concerned with service of process within a permissible time period.

[92] 304 N.Y. 440, 108 N.E.2d 397 (1952).

[93] Teresta v. City of New York, 304 N.Y. 440, 443, 108 N.E.2d 397, 398 (1952).

authority from relying on a defense of failure to file properly a notice of claim.

ARTICLE 6 — JOINDER OF CLAIMS, CONSOLIDATION AND SEVERANCE

CPLR 603: Court grants separate trial for severable issues.

Pursuant to CPLR 603, a trial court may on its own motion sever the issues in an action, and order a separate trial of any claim or of any separate issue for convenience or to avoid prejudice.

In *Hacker v. City of New York*,[94] the appellate division, first department, in interpreting CPLR 603, explained and expanded the procedure of granting separate trials of severable issues. In *Hacker*, an action for personal injuries, the parties stipulated that the issue of liability be tried by the court without a jury, in advance of the issue of damages. Having found for the plaintiff on the issue of liability, the court ordered the trial of damages to be placed on the calendar. The City then appealed and moved for a stay of the trial of damages pending this appeal. The instant court, in a unanimous opinion, held that defendant was entitled to appeal from the judgment on the separate issue of liability, and granted a stay of the trial of damages.

This decision was contrary to *Bliss v. Londner*,[95] wherein the second department held that although separate trials on the issues of liability and damages were proper, a finding on the liability issue was merely a ruling in the course of the trial, and an appeal from such a ruling must await the entry of a judgment. The instant court called the *Bliss* decision irrelevant because "we do not have in this case . . . 'one continuous proceeding' in which the issues of liability and damages proceed to determination together. . . ."[96] The court compared the appeal allowed here with an appeal from an order granting summary judgment and directing an assessment of damages.

ARTICLE 10 — PARTIES GENERALLY

Vouching in: Available where party sought to be vouched in is the defendant's indemnitor.

Vouching in, the common-law ancestor of impleader,[97] is used today in cases where impleader cannot be used.[98] The defendant,

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[94] 25 App. Div. 2d 35, 266 N.Y.S.2d 194 (1st Dep't 1966).

[95] 20 App. Div. 2d 640, 246 N.Y.S.2d 296 (2d Dep't 1964).

[96] Hacker v. City of New York, 25 App. Div. 2d 35, 37, 266 N.Y.S.2d 194, 196 (1st Dep't 1966).

[97] CPLR 1007.

[98] For example, impleader cannot be used where the third person is not subject to the jurisdiction of the court in which the defendant has been sued.